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RIGHTS OF SEPARATE AND OF PARTNERSHIP CREDITORS IN DISTRIBUTION OF INDIVIDUAL ASSETS OF PARTNERS.—The rule that separate creditors are preferred over partnership creditors in the distribution of the individual assets of the partners by a court of equity, grew out of the English practice in bankruptcy. It was first laid down in *Ex parte Crowder* (1715),[1] where Lord Hardwicke held that separate creditors should be allowed to prove their debts under a joint commission issued against the partners, and should have priority over the partnership creditors as to the individual assets. Lord Thurlow, however, overruled this doctrine in *Ex parte Hodgson* (1785),[2] deciding that partnership creditors might prove their debts under a separate commission issued against one of the partners, and receive dividends from the individual assets *pari passu* with the separate creditors. In *Ex parte Elton* (1796)[3] Lord

[1] 2 Vern. 706.

[2] 2 Brown Ch. 5. Followed by Lord Thurlow in Ex parte Page, 2 Brown Ch. 119; Ex parte Flintum, 2 Brown Ch. 120. See Ex parte Cobham, 1 Brown Ch. 577.

[3] 3 Ves. Jr. 238. The opinion implies that the rules of Lord Hardwicke and of Lord Thurlow are essentially identical, differing only in procedure, affirming that under the latter rule a petition in equity by the separate creditors to restrain the partnership creditors from exhausting the individual assets before the payment of the separate creditors would be granted of course. The reports, however, contain no cases decided by Lord Thurlow to this effect; and his opinions indicate his intention to formulate a rule of substantive rights. See also Gray *v.* Chiswell, 9 Ves. Jr. 118, which Lord Eldon, in the opinion, expressly declares to be the *first* case in equity involving the principal question under consideration.

Rosslyn (Lord Loughborough) re-established the doctrine of *Ex parte Crowder,* allowing firm creditors to prove their debts under a separate commission, but postponing their claims against the individual assets to those of the separate creditors.[4] Lord Eldon followed the decision of Lord Rosslyn, "observing, that he did so, that the rule should not change with every new Judge, rather than from any other motive," and without "presuming to say, which is the best rule."[5] This rule of bankruptcy was affirmed as a principle of equity in *Gray* v. *Chiswell,*[6] Lord Eldon stating in the opinion that it was very difficult to see upon what reason the rule was based. Although often doubted on principle, the rule, with certain exceptions,[7] has since become a settled doctrine in England.[8] It has been followed in America by a majority of the courts,[9] but has been repudiated in some jurisdictions.[10] In Kentucky and Georgia[11] it has been held that separate creditors receive a dividend from the individual assets equal to that received by partnership creditors from the partnership assets, and all creditors share the remainder *pari passu.*[12]

The first reason given for the English rule was that to hold otherwise would necessitate a suit in equity in every case to restrain the partnership creditors from going against the individual assets before

[4] See Ex parte Kensington, 14 Ves. Jr. 447, where it is stated that Lord Rosslyn, upon first coming to the bench, "preferred that rule he had so often agitated at the bar; but his lordship afterwards established the rule in Ex parte Elton."

[5] Ex parte Clay, 6 Ves. Jr. 813. [6] *Supra.*

[7] Notably where there is no joint estate and no solvent partner. Ex parte Hayden, 1 Brown Ch. 454; Ex parte Pinkerton, 6 Ves. Jr. 814 (note); Ex parte Kennedy, 2 De G. M. & G. 228. So also in America. Alexander *v.* Gorman, 15 R. I. 421, 7 Atl. 243. But see Warren *v.* Farmer, 100 Ind. 593.

[8] Dutton *v.* Morrison, 17 Ves. Jr. 193; Lodge *v.* Prichard, 1 De G. J. & S. 610.

[9] Murrill *v.* Neill, 8 How. (U. S.) 414; Rodgers *v.* Meranda, 7 Ohio St. 179; M'Culloh *v.* Dashiell, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271; Black's Appeal, 44 Pa. St. 503.

[10] Camp *v.* Grant, 21 Conn. 41, 54 Am. Dec. 321; White *v.* Dougherty, 1 Mart. & Y. (Tenn.) 308, 17 Am. Dec. 802; Bradwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687; Blair *v.* Black, 31 S. C. 346, 9 S. E. 1033, 17 Am. St. Rep. 30. Where a statute declares the personal representative of one jointly bound may be charged as if the deceased has been bound severally as well as jointly, it has been held that a firm creditor has equal rights with separate creditors against the decedent's estate. Pettyjohn *v.* Woodruff, 86 Va. 478, 10 S. E. 715; McLain *v.* Carson, 4 Ark. 164, 37 Am. Dec. 777; Freeport Stone Co. *v.* Carey, 42 W. Va. 276, 26 S. E. 183. And also in the absence of statute. Hutzler *v.* Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687.

[11] Also in Pennsylvania prior to Black's Appeal, *supra.* Bell *v.* Newman, 5 Serg. & R. (Penn.) 78.

[12] Northern Bank *v.* Keizer, 63 Ky. 169. In Georgia the rule is the result of a statute. Johnson *v.* Gordon, 102 Ga. 350, 30 S. E. 507. The reason given is that where one creditor has recourse to two funds, and a second creditor has recourse to only one of these funds, the second creditor has priority as to the singly charged fund "coextensively with his privation." It is submitted that this is unsound. *Vide infra.*

the separate creditors had been satisfied.[13] This assumes the question under consideration, and therefore is not a sound reason, even for the rule in bankruptcy. It has been followed in many cases on authority alone;[14] and in others it has simply been asserted to be the law.[15] The courts have been unable to agree upon a principle to support the rule; it has often been termed a rule of convenience,[16] but this is no justification;[17] it has been based upon the statement that partnership credit is extended on the faith of the social assets, and separate credit on the faith of the individual assets.[18] This statement, however, is untrue in fact.[19] The rule has been upheld on the principle of marshalling assets, since the partnership creditors have recourse to two funds and the separate creditors to one only.[20] But this principle requires only that the firm creditors should exhaust the partnership funds before going against the individual assets, and does not explain postponing firm debts remaining unsatisfied by the partnership funds to separate debts in the distribution of individual assets, for marshalling never deprives the doubly secured creditor of his superior equity.[21] It has even been stated that since credit is given on the faith of this rule, it would be inequitable to hold otherwise. This is reasoning in a circle—the law and the giving of credit being made each the reason for the other.[22] The rule has been defended on the ground that in practice it tends to equality between the two classes of creditors.[23] But the truth of this depends upon the relative size of the two funds in each particular case.[24] This tendency to establish equality between the two classes of creditors seems to underlie all the reasons given for the rule, the most frequent basis stated being that since partnership creditors are preferred as to social assets, it necessarily follows upon obviously equitable principles that separate creditors should have priority as to individual assets.[25] It is submitted that such a prin-

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[13] Ex parte Elton, *supra.*

[14] Murrill *v.* Neill, *supra;* Kirby *v.* Carpenter, 7 Barb. (N. Y.) 373; Ives *v.* Mahoney, 71 Minn. 155, 73 N. W. 720; Colwell *v.* Weybosset National Bank, 16 R. I. 288, 15 Atl. 80.

[15] Miller *v.* Clark, 37 Ia. 325; Forbes *v.* Scannel, 13 Cal. 243; Thayer *v.* Humphrey, 91 Wis. 276, 64 N. W. 1007.

[16] Lodge *v.* Prichard, *supra;* Smith *v.* Mallory, 24 Ala. 628; Black's Appeal, *supra.*

[17] Rodgers *v.* Meranda, *supra.*

[18] M'Culloh *v.* Dashiell, *supra;* Irby *v.* Graham, 46 Miss. 425; Weyer *v.* Thornburgh, 15 Ind. 124.

[19] Camp *v.* Grant, *supra;* Bardwell *v.* Perry, *supra.*

[20] Davis *v.* Howell, 33 N. J. Eq. 72.

[21] Alley *v.* Rogers, 19 Gratt. (Va.) 366. See 20 HARV. LAW REV. 594; Grubbs *v.* Wysor, 32 Gratt. (Va.) 127.

[22] See Re Willcox, 94 Fed. 84 (D. C., Mass.).

[23] Rodgers *v.* Meranda, *supra.*

[24] If it be granted that equality is paramount, then the Kentucky-Georgia rule is the more logical.

[25] Hundley *v.* Ferris, 103 Mo. 78, 15 S. W. 312, 12 L. R. A. 254, 23 Am. St. Rep. 863; Warren *v.* Farmer, *supra;* dissenting opinion in Bell *v.* Newman, *supra.*

ciple, as well as the rule itself and the other reasons given in its support, ignore the fundamental principles which determine the nature of partnership obligations and the rights of partnership creditors. At law each partner is bound both to partnership creditors and to his separate creditors; either class may levy on his entire individual property for the entire debt, without priority over the other, and in equity he is likewise liable *in solido* for the partnership debts. The partnership creditor, moreover, has a paramount right to the firm property—a right derived from the unwaved lien of the debtor-partners, and not given to him as a matter of favoritism to creditors.[26] The separate creditors, on the other hand, have no such right at law as to the individual assets, nor is there any analogous foundation for such a right in equity. Their rights are against the property of their debtor alone, both at law and in equity, and although this includes his "interest" in the partnership, the value of this "interest" depends upon the amount of the partnership indebtedness. The two classes of creditors are in no sense on an equal plane, and any attempt to equalize their claims is to rob the partnership creditor of his legal right and to destroy the logical effect of the basic principles of the law of partnership. The true rule, then, is that the individual assets of the partners are to be applied to the partnership debts remaining unsatisfied by the partnership property *pari passu* with the separate debts of the partners. *Robinson* v. *Security Co.* (Conn.), 87 Atl. 879.

DISTRIBUTION OF EXTRAORDINARY DIVIDENDS AS BETWEEN LIFE TENANT AND REMAINDERMAN.—Where a trust fund consisting of corporate stock has been created, the income of which is to go to a life tenant with remainder over, much uncertainty has been shown by the courts in determining the rights of the parties as to extraordinary dividends. There are two widely differing American views:

I. According to the Pennsylvania or majority view, first clearly announced in Earp's Appeal,[1] the whole emphasis is laid upon the ascertainment of the period of time within which the surplus profits accrued, and all extraordinary dividends whether in stock, cash or scrip, earned prior to the date of taking effect of the trust, are, though not declared until after such date, part of the corpus of the trust fund to be held for the future benefit of the remainderman. All extraordinary dividends earned after such date are income and go as such directly to the life tenant. But the rule is in every case subject to the proviso that although the value of the trust fund may be reduced by business disasters to the corporation without giving the remainderman any rights in the ordinary dividends, yet the corporation cannot by means of extraordinary dividends take value

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[26] Saunders *v.* Reilly, 105 N. Y. 12, 59 Am. Rep. 472; Case *v.* Beauregard, 99 U. S. 119.

[1] 28 Pa. St. (4 Casey) 368.